Office Depot *and* Denise M. DeLaura. Case 7–CA–38847

February 16, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On June 13, 1997, Administrative Law Judge Steven M. Charno issued the attached bench decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found, and we agree, that Section 10(b) of the Act does not bar the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by threatening employees that if they selected the Union, they would earn less money, would not be able to communicate with management in the same way, and would have to pay union dues.

The Board stated in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), that in considering the sufficiency of a charge to support an allegation in the complaint under Section 10 (b), "the Board has generally required that the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge." To determine whether the complaint allegations are sufficiently related to the charge allegations, the Board applies a "closely related" test comprised of the following factors: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether a respondent would raise similar defenses to the allegations.[3]

In *Ross Stores, Inc.*, 329 NLRB 573 (1999), the Board reaffirmed *Nickles Bakery* and other precedent consistently holding that the requisite factual relationship under the "closely related" test may be based on acts that arise out of the same antiunion campaign.[4] The Board thus overruled *Nippondenso Mfg. U.S.A.,* 299 NLRB 545 (1990), to the extent that it held that the factual relationship could not be so based. [5]

Under the "closely related" test as set forth in *Nickles Bakery* and *Ross Stores*, we find that the threat allegations in the complaint are closely related to the discharge allegation in the charge. The charge alleged violations of Section 8(a)(1) and (3). It stated:

> On or about July 12, 1996, Denise DeLaura was discharged by the above-named Employer because of her union activities.
>
> My discharge happened in the midst of an ongoing union organizing drive by the Teamsters Union. This organizing drive is still active now.

On September 23, 1996, the Regional Director for Region 7 approved the withdrawal of the charge allegation that Section 8(a)(3) had been violated. He stated:

> With my approval the 8(a)(3) aspect of this case has been withdrawn. The balance of the charge remains in full force and effect.

The relevant allegations in the complaint are set forth in paragraphs 8 and 9 of the complaint. They read as follows:

> 8. About mid-June, 1996, Respondent, at its Plymouth, Michigan, facility, by its agent Kenneth J. Zill, threatened employees that they would earn less money, would have to pay union dues and would not be able to take their problems to management if they selected a union as their collective bargaining representative.
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> 9. (a) About July 12, 1996, Respondent at its Plymouth, Michigan, facility, by its agent Kenneth Zill, discharged the Charging Party, an employee;
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> (b) Respondent took the action set forth in subparagraph (a) above because of her protected concerted activity of making common cause with employees engaged in a protected work stoppage at the Detroit Newspaper Agency.

The Respondent argues that under the rationale of *Nippondenso*, supra, 299 NLRB 545, and *Lovejoy Indus-*

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Excel Container*, *Inc*., 325 NLRB 17 (1997).

[3] See also *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

[4] Although *Ross Stores* addressed the test for determining whether otherwise time-barred allegations in an amended charge relate back to allegations of an earlier timely filed charge, the same test applies to determining the relatedness of complaint allegations to an unfair labor practice charge. *Ross Stores*, 329 NLRB 573 fn. 6.

[5] In *Nippondenso*, the charge alleged the 8(a)(3) discharge of a union organizing committee member. The resulting complaint included allegations of no-solicitation and no-distribution rules directed against union activity in violation of Sec. 8(a)(1), but the complaint did not include an 8(a)(3) discharge allegation. The Board found that the General Counsel failed to establish a factual nexus between the allegations in the charge and those set forth in the complaint. It rejected the argument that the requisite factual nexus could be based solely on the legal theory that the acts at issue in the charge and complaint took place "during and in order to quell, a union campaign."

tries,[6] the threat allegations of the complaint are not closely related to the discharge allegation of the charge. The Respondent contends that there is no factual relationship between the threat and discharge allegations because they involve separate labor relations events at different employers. Thus, the discharge allegation of the charge concerns DeLaura's making common cause with the employees of Detroit News Agency who were engaged in a protected work stoppage, whereas the threat allegations of the complaint concern the Respondent's remarks to its employees during a union campaign at its facility. The Respondent also argues that the discharge and threat allegations do not involve the same legal theory because the discharge allegation is based on disparate treatment, whereas the threat allegations are based on "simple interference" with Section 7 rights. Finally, the Respondent contends that the defenses to the allegations are different because the defense to the discharge allegation is business justification, whereas the defense to the threat allegations is that they did not occur.

Relying on an analysis that was rejected by the Board in *Ross Stores*,[7] the Respondent reads the charge too narrowly. As stated above, the charge—even after the withdrawal of the 8(a)(3) allegation—alleges that the DeLaura discharge occurred in the midst of an ongoing union organizing drive that is still active. An investigation of DeLaura's discharge, therefore, would logically entail an investigation of the Respondent's conduct in response to the organizing campaign.[8] Such an investigation thus would encompass the statements the Respondent made to employees the prior month that if they selected the Union, they would earn less money, would not be able to communicate with management in the same way, and would have to pay union dues. Accordingly, by including the threat allegations in the complaint the General Counsel did not expand a charge upon his own initiative to include allegations that have no reasonable nexus with the charge that put the investigation into motion.[9] Consequently, we find that under the rationale of *Nickles Bakery* and *Ross Stores*, the threat allegations of the complaint are supported by the charge.

At the hearing in this proceeding, the Respondent similarly argued that the discharge allegation of the complaint was not supported by the charge.[10] The Respondent stressed that when the Charging Party withdrew her 8(a)(3) charge, she did not file a new or amended charge. Thus, the only charge in this proceeding alleges DeLaura was discharged for union activity at her place of employment. According to the Respondent, this allegation bears no relationship to the discharge allegation in the complaint involving common cause with the union activity of employees of a different employer. Thus, the Respondent argued, under *Nippondenso*, supra, there is no factual nexus between the discharge allegation of the charge and that of the complaint.

Again, the Respondent reads the charge too narrowly. When the Regional Director approved the withdrawal of the 8(a)(3) aspect of the case, he stated: "The balance of the charge remains in full force and effect." The balance of the charge is the allegation that DeLaura's discharge, which occurred during an organizing campaign at her place of employment, violated Section 8(a)(1). The investigation of this charge would logically extend to an investigation of the Respondent's conduct toward any form of DeLaura's protected activity, whether in connection with protected activity at her place of employment or with the protected activity of employees of a different employer.[11] Thus, as was the case with the inclusion of the threat allegations in the complaint, the General Coun-

[6] 309 NLRB 1085 (1992), enfd. in part and remanded 26 F.3d 162 (D.C. Cir. 1994), supplemental decision 317 NLRB 1353 (1995), enfd. in part 93 F.3d 854 (D.C. Cir. 1996). In *Lovejoy Industries*, the charge alleged, inter alia, that the employer unlawfully issued written warnings to three employees. The complaint alleged, inter alia, that in violation of Sec. 8(a)(1), the respondent told its employees that they would not be permitted to wear tee-shirts with union insignia during working hours, while it allowed employees to wear similar garments without union insignia. The respondent argued that the complaint allegation regarding the tee-shirts must be dismissed as untimely under Sec. 10(b) because it was neither contained in the charge nor closely related to any allegation in the charge. The Board majority found that the tee-shirt allegation in the complaint was not closely related to the warning allegations in the charge because, inter alia, the General Counsel did not argue that the allegations were connected, either factually or legally, as part of an overall plan to resist the union. Citing the fact that the tee-shirt and warning allegations arose from the same antiunion campaign, Member Devaney dissented and would have found no 10(b) bar.

[7] As discussed above, the Board expressly overruled *Nippondenso* in *Ross Stores.* To the extent that *Lovejoy Industries*, like *Nippondenso*, departs from precedent holding that the requisite *Nickles Bakery* factual relationship may be based solely on acts that arise out of the same antiunion campaign, *Lovejoy Industries* has not survived *Ross Stores.*

[8] See *Ross Stores*, supra.

[9] Id. at fn. 12.

[10] The Respondent made this argument to the judge in its motion to dismiss the complaint and its petition to revoke the General Counsel's subpoena duces tecum. The Respondent filed exceptions to the judge's denial of its motion to dismiss the complaint; however, it did not argue in its supporting brief to the Board that the discharge allegation of the complaint was not supported by the charge. Rather, the Respondent limited its argument in its brief to the claim that the judge erred in denying its motion to dismiss the threat allegations of the complaint. The Respondent's failure to urge specifically that the judge also erred in denying its motion to dismiss the discharge allegation of the complaint constitutes a waiver of the issue under Sec. 102.46 (b)(2) of the Board's Rules. In any event, as discussed in the text infra, we find that the discharge allegation of the complaint is supported by the charge.

[11] In addition, there is a reasonable connection between the complaint's allegation that the Respondent discharged DeLaura because of her actions with regard to the union campaign at DNA and the Respondent's attitude toward the union campaign at its own facility. The judge recognized this connection in his decision. ("Respondent's need to immediately discharge an individual who had made common cause with employees engaged in a protected union strike becomes more understandable in the context of the Union organizing campaign directed against Respondent at the time and Respondent's demonstrated anti-union animus in the context of that campaign.") For the purposes of 10(b) analysis, this connection is certainly sufficient to establish that the complaint allegation is "closely related" to the remaining allegations of the charge.

sel's inclusion of the discharge allegation in the complaint does not constitute the expansion of a charge to contain allegations that have no reasonable nexus with the charge that put the investigation into motion. Accordingly, we find that under the "closely related" test of *Nickles Bakery* and *Ross Stores*, the discharge allegation of the complaint is supported by the charge.

2. We agree with the judge's finding that the Respondent violated Section 8(a)(1) by threatening employees that they would earn less money if they selected the Union.[12] However, for the reasons stated below, we disagree with the judge's finding that the Respondent violated Section 8(a)(1) by also telling employees that they would not be able to communicate with management in the same way and would have to pay union dues.

The Board has long held that there is no threat, either explicit or implicit, in a statement that explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before. Section 9(a) contemplates a change in the manner in which employer and employee deal with each other, and an employer's reference to this change cannot be characterized as a retaliatory threat to deprive employees of their rights. *Tri-Cast, Inc.*, 274 NLRB 377 (1985).

According to the credited testimony, the Respondent told employees that "we wouldn't be able to communicate with management in the same way that we are right now because there would be a representative from the union that would be the middle person." This statement is virtually identical to the employer statements found permissible in *Tri-Cast*.[13] Accordingly, we find that the Respondent did not violate Section 8(a)(1) of the Act by its remarks to employees concerning communication.

Similarly, we find nothing unlawful in the Respondent's statement that the employees would have to pay Union dues if they selected the Union. It is an economic reality that unions may collect dues from the employees they represent.[14] The Respondent's statement about dues simply conveys to employees this reality. It does not convey any explicit or implicit threat of reprisal against employees for exercising their statutory right to select a union as their exclusive collective-bargaining representative. Even if the Respondent's statement could be considered untruthful, in that not all employees in union-represented units "have" to pay union dues, it is still nothing more than a misrepresentation about unions' ability to enforce payment of dues and not a threat of adverse action by the Respondent. We, therefore, find that the Respondent's statement about Union dues does not violate Section 8(a)(1) of the Act. *New Process Co.*, 290 NLRB 704, 707 (1988), enfd. mem. 872 F.2d 413 (3d Cir. 1989).

3. The judge found, and we agree for the following reasons, that the Respondent discharged DeLaura in violation of Section 8(a)(1) because of her protected concerted activity of making common cause with the employees of another employer who were engaged in a protected work stoppage.

The essential facts are not in dispute. On July 8, 1996, DeLaura was approached by a person indicating that he was to pick up an order for one of the Respondent's customers, the Detroit Newspaper Agency (DNA). DeLaura said to him in a normal tone of voice, "Oh, you work for the scab newspaper." (According to the stipulated facts, DNA employees were engaged in a lawful work stoppage at the time.) The DNA employee explained that he had worked for his employer for many years and had a family to feed. There was no further exchange between DeLaura and the DNA employee. DNA subsequently complained to the Respondent about the incident. On July 10, Kenneth Zill, the Respondent's top manager, went to the shipping and receiving office where DeLaura worked and asked whether someone in that office had called the DNA employee a scab 2 days earlier. DeLaura admitted that she had told the DNA employee that he worked for a scab newspaper. It is undisputed that the Respondent discharged DeLaura on July 12 on the basis of her admission. It characterized her remark as a "verbal assault."

It is well settled that employees' conduct on behalf of the employees of another employer who are engaged in protected concerted activity is itself protected concerted activity. *Boise Cascade Corp.*, 300 NLRB 80, 82 (1991). Here, DeLaura's use of the term "scab" was an expression of support for the striking DNA employees and amounted to making common cause with the protected concerted activity of the employees of another employer. DeLaura's conduct, therefore, was protected under the rationale of *Boise Cascade*. Further, there is no showing that DeLaura's conduct was so flagrant or egregious as to warrant loss of the Act's protection.[15] On the contrary, she spoke in a normal tone of voice and made no further comments when the DNA employee responded to her remark.

[12] See, e.g., *Clements Wire & Mfg.*, 257 NLRB 206, 213 (1981) (supervisor unlawfully threatened that employees would be making less money, not more, if union came in). As in *Clements Wire*, the Respondent's statement here was not supported by any objective facts. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

[13] The employer's statements in *Tri-Cast* were: "We have been able to work on an informal and person-to-person basis. If the union comes in this will change. We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing."

[14] Cf. *Automotive & Allied Industries Local 618 (Sears, Roebuck & Co.)*, 324 NLRB 865, 866 fn. 12. (1997) (not unlawful for union to tell employees that unless a sufficient number of employees sign financial-core agreements, union could not afford to continue representing employees, because such statement by union conveys an economic reality to employees).

[15] See *NLRB v. Cement Transport*, 450 F.2d 1024, 1029–1030 (6th Cir. 1974), cert. denied 419 U.S. 828 (1974).

The Respondent concedes that it discharged DeLaura for her use of the term "scab" to the DNA employee. The Respondent, therefore, violated Section 8(a)(1) by discharging DeLaura as a consequence of her protected concerted activity of making common cause with the striking DNA employees. *Mast Advertising & Publishing*, 304 NLRB 819, 820 (1991) (respondent violated Sec. 8(a)(1) by admittedly suspending employee because of protected concerted activity, where employee's conduct was not so flagrant or egregious to lose the Act's protection).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Office Depot, Inc., Plymouth, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that if they select a union as their collective-bargaining representative, they will earn less money.

(b) Discharging its employees because of their protected concerted activity of making common cause with employees engaged in a protected work stoppage.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer Denise DeLaura full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Denise DeLaura whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Denise DeLaura and, within 3 days thereafter, notify Denise DeLaura in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Plymouth, Michigan facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since mid-June 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees that they will earn less money if they select a labor organization as their collective-bargaining representative.

WE WILL NOT discharge Denise DeLaura or any other employee because of their protected concerted activities of making common cause with employees engaged in a protected work stoppage.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Denise DeLaura full reinstatement to her former position of employment or, if that position no longer exists, to a substantially equivalent position, with-

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

out prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Denise DeLaura whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days of the date of the Board's Order, remove from our files any reference to the unlawful discharge of Denise DeLaura, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

OFFICE DEPOT, INC.

Amy Bachelder, Esq. and *Blair Simmons, Esq*., for the General Counsel.

Mark Theodore, Esq. (Jackson, Lewis, Schnitzler & Krupman), of San Francisco, California, for the Respondent.

DECISION AND CERTIFICATION

STEVEN M. CHARNO, Administrative Law Judge. This case was tried before me in Detroit, Michigan, on May 6, 1997. After oral argument, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations. Appendix A is the portion of the transcript containing my decision, while Appendix B contains corrections to that transcript [omitted from publication]. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of the amended transcript containing my decision.

[Recommended Order omitted from publication.]

APPENDIX A

BENCH DECISION

[Errors in the transcript have been noted and corrected**.]**

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MS. SIMMONS: All right. If You're asking me about DeLaura's comment saying she didn't mean anything by it, it's clear that she was saying, I think as she testified, that she didn't mean to offend anyone, not that it was a joke.

JUDGE CHARNO: Do you have Southwestern Bell—

MR. THEODORE: Yes, and —

JUDGE CHARNO:—or is there any other case that you wanted me to look at?

Thank you.

I will get back to you all as rapidly as I possibly can.

(A brief recess)

JUDGE CHARNO: On the record.

In response to a charge, timely file, a complaint was issued on September 25, 1996, which, as amended, alleges that Office Depot, Inc., the Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, by threatening its employees and by discharging the Charging Party, Denise DeLaura.

Respondent's answer denied the commission of any unfair labor practice.

A hearing was held before me in Detroit, Michigan, on May 6, 1997. At the conclusion of the presentation of evidence the parties presented oral argument.

Based on the evidence of record and the parties arguments, I am rendering a bench decision.

Respondent is engaged in the retail sale and distribution

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of office supplies, with a warehouse facility In Plymouth, Michigan.

During calendar year 1995 Respondent, in the course of its business, purchased and received goods valued in excess of $50,000 from outside the state and derived gross revenues in excess of $500,000.

It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of the Act.

All relevant events in this case took place during two ongoing labor relations events.

The first was the stipulated strike of six unions against the Detroit Free Press, the Detroit News and the Detroit Newspaper Agency, which I shall hereafter refer to as DNA.

That strike began on July 13, 1995 and was ongoing as of July 12, 1996.

The second event was a campaign by an unidentified union to organize Respondent's employees at the Plymouth facility, which campaign was evidenced by union handbilling outside the facility two to three days a week from mid-May 1996 through, at least, July 12, 1996.

This finding is based on the testimony of Mr. Piotruchowski, whom I found to be a completely candid and reliable witness with little demonstrated interest in being represented by a union and no demonstrated interest in the outcome of this proceeding.

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Mr. Piotruchowski's account was wholly corroborated by the testimony of the Charging Party.

Mr. Kenneth Zill, the top manager at Respondent's Plymouth facility, testified that his facility was only handbilled on a total of two or three occasions.

I reject Mr. Zill's self-serving testimony on this point because, first, I find Piotruchowski to be the more credible witness and second, because I find it unlikely that infrequent, isolated instances of handbilling, testified to by Mr. Zill, would have caused Respondent to organize the admitted series of Employee meetings, which it held to discuss the Union's organizing campaign.

During June of 1996 Respondent held a mandatory employee meeting which was attended by all 20 receiving department employees on the first shift at the Plymouth facility. At that meeting Mr. Zill stated that if the union got in the employees would probably earn less money and would not be able to communicate with management in the same way as they could at that time.

This finding is based upon Mr. Piotruchowski's uncontroverted testimony.

Mr. Zill, who listened carefully to questions posed to him and answered those questions with similar care, did not directly deny that having the union in would, "probably,"

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result in lower wages, or that employees would no longer be able to communicate with management, "in the same way."

At the same meeting Mr. Zill told the employees that, if the Union got in, the employees would have to pay union dues. Piotruchowski so testified, while Mr. Zill denied the statement attributed to him.

For the reasons outlined above, and based on the demeanor of both witnesses while testifying, I credit Piotruchowski over Zill on this issue.

Accordingly I find that Respondent threatened its employees as alleged in Paragraph 8 of the Complaint and conclude that this conduct was an unfair labor practice in violation of Section 8(a)(1) of the Act.

Turning to the discharge allegation, it is uncontested that on July 8, 1996, the Charging Party was approached by an individual who indicated that he was at the Plymouth facility to pick up an order for DNA, one of Respondent's customers.

The Charging Party then remarked, in a normal volume of voice, "Oh, you work for the scab newspaper."

The DNA employee felt the need to explain that he had worked for his employer for many years and had a family to feed.

Subsequently DNA complained to Respondent about the incident.

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On July 10 Mr. Zill entered the shipping and receiving office where the Charging Party was employed and inquired as to whether someone in that office had called the DNA employee scab two days earlier.

Charging Party immediately admitted that she had said that the DNA employee worked for a scab newspaper.

What Charging Party said immediately thereafter is disputed. She testified that she added to her admission that she didn't mean anything else. Mr. Zill testified that she said her admitted statement had been a joke.

Mr. Zill's account appears improbable given the fact that the Charging Party's father, with whom she resided, had been involved in the newspaper strike for 12 months. And I accept Charging Party's testimony, and the General Counsel's argument that she intended to state that she did not mean to personally offend the DNA employee.

It is further undisputed that Respondent, relying on and based on the Charging Party's admission, discharged her on July 12, 1996.

Respondent's Performance Improvement Process, which governs Respondent's disciplinary process, provides that, "in all but the most serious cases" the correction of a deficient employee's conduct should begin with verbal counseling.

Mr. Zill contends that Charging Party's behavior was sufficiently serious to warrant immediate termination without

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prior warning or counseling on the grounds that her comment constituted a, "verbal assault," on the DNA employee.

The other two instances of verbal assaults testified to by Mr. Zill both involve the delivery of, "abusive profanity in a threatening tone," which in no way corresponded to the situation involving the Charging Party.

There is no reason to believe that the seemingly disproportionate nature of Respondent's reaction to the Charging Party's comment was caused by DNA's complaint. That is, there is no evidence that DNA would have been dissatisfied if the offender had been given a warning rather than discharged.

This case appears to raise questions of first impression legally. Two legal issues require resolution at this juncture.

The first is whether the use of the term "scab" can be protected activity. Based on *Boise Cascade Corp*., 300 NLRB 80, 82 (1990), I conclude that it can.

I note in passing that there is no evidence in this case which establishes that prohibition of the term "scab" was required to maintain discipline, safety or production at the Plymouth facility.

The second question is whether an exercise of protected activity on behalf of the employees of another employer remains protected. Again, based on *Boise Cascade Corp*., supra, I conclude that it does and that such an act may constitute a

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making of common cause with the employees of another employer.

I find that Charging Party's use of the term scab was intended to express support for those employees on strike against DNA, the Free Press and the News.

I further find that the reference to a, "scab newspaper," when made to a DNA employee, leaves no doubt as to the employees with whom the Charging Party was attempting to make common cause.

Respondent's need to immediately discharge an individual who had made common cause with employees engaged in a protected union strike becomes more understandable in the context of the Union organizing campaign directed against Respondent at that time and Respondent's demonstrated anti-union animus in the context of that campaign.

For the foregoing reasons I find that Respondent's rationale for the Charging Party's discharge was pretextual and the discipline itself was disparate and a direct result of the Charging Party's protected, concerted activity.

I therefore conclude that Ms. DeLaura's termination was an unfair labor practice in violation of Section 8(a)1 of the Act.

Time for appeal of this decision does not begin until I issue the appropriate order, which will not occur until I receive and revise the transcript.

Are there any other matters to raise before I close the record?